

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

ROBERT G. FURST,

Plaintiff,

vs.

GERALD K. SMITH, as Personal Representative of  
the ESTATE OF SCOTT M. COLES; ASHLEY M.  
COLES; CHRISTOPHER OLSON and JANE DOE  
OLSON,

Defendants.

**NO. 2:09-cv-02336-JWS**  
**NO. 2:11-cv-01651-JWS**

**ORDER AND FINAL  
JUDGMENT**

**(Assigned – Honorable John W.  
Sedwick)**

JAMES CORDELLO, trustee of the Mortgages Ltd.  
401(k) Plan,

Plaintiffs,

vs.

MICHAEL DENNING; JANE DOE DENNING;  
GERALD K. SMITH, as Personal Representative of  
the ESTATE OF SCOTT M. COLES;  
CHRISTOPHER OLSON; and JANE DOE OLSON,

Defendants.

This Order concerns the settlement (“Settlement”) of this litigation (the  
“Action”) involving claims for alleged violations of the Employee Retirement Income

1 Security Act of 1974, as amended, 29 U.S.C. §§ 1001, et seq. (“ERISA”) with respect  
2 to the Mortgages Ltd. 401(k) Plan (the “401(k) Plan” or the “Plan”).<sup>1</sup>

3 On August 9, 2012 (ECF No. 110), the Court entered its Order Preliminarily  
4 Approving Settlement, Certifying Class, Approving Form of Notice, and Setting  
5 Fairness Hearing (“Preliminary Approval Order”). The Court has received declarations  
6 attesting to the mailing of the Notice and publication of the Publication Notice in  
7 accordance with the Preliminary Approval Order. This matter came before the Court  
8 for a hearing on October 23, 2012, (the “Final Approval Hearing”), pursuant to the  
9 Preliminary Approval Order of this Court entered on August 9, 2012, on the  
10 application of the Parties for approval of the Settlement set forth in the Settlement  
11 Agreement.

12 Before the Court are: (1) Named Plaintiffs’ Motion for Final Approval of  
13 Settlement, for Settlement Class Certification, and for approval of Plan of Allocation  
14 (“Final Approval Motion”); and, (2) Named Plaintiffs’ Motion for Award of  
15 Attorneys’ Fees and Expenses and Named Plaintiff’s Case Contribution Award (“Fee  
16 and Expense Motion”).

17 Due and adequate notice having been given to the Settlement Class as required  
18 in the Preliminary Approval Order, and the Court having considered all papers filed  
19 and proceedings had herein and otherwise being fully informed in the premises and  
20 good cause appearing therefor, IT IS ORDERED, ADJUDGED AND DECREED AS  
21 FOLLOWS:

22 1. The Court has jurisdiction over the subject matter of this Action and all  
23 parties thereto pursuant to 29 U.S.C. § 1132(e), including all members of the  
24 Settlement Class.

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25 <sup>1</sup> All capitalized terms used in this Final Order and not defined herein, shall have the  
26 meanings assigned to them in the Settlement Agreement submitted to the Court on  
July 24, 2012 (ECF No. 104-1) (the “Settlement Agreement”).

1           2.       The Settlement Class is certified as a non-opt-out class under Fed. R.  
2 Civ. P. 23(b)(1)(B) for settlement purposes only.

3           3.       Notice of the Settlement was mailed to Settlement Class Members on  
4 August 23, 2012 as directed by the Court's Preliminary Approval Order.

5           4.       On August 24, 2012, a copy of the Publication Notice was published in  
6 the Arizona Republic in accordance with the Settlement Agreement and the Court's  
7 Preliminary Approval Order.

8           5.       On August 24, 2012, in accordance with the Court's Preliminary  
9 Approval Order, the Notice and Settlement Agreement were posted on  
10 [www.kellersettlements.com/mortgagesltd](http://www.kellersettlements.com/mortgagesltd).

11           6.       The Notice and the Publication Notice fully informed Settlement Class  
12 Members of their rights with respect to the Settlement, including the right to object to  
13 the Settlement, and of Class Counsel's application for an award of attorneys' fees,  
14 reimbursement of expenses and for payment of a case contribution award to the  
15 Named Plaintiff, all from the Settlement Fund.

16           7.       The Notice and Publication Notice collectively met the statutory  
17 requirements of notice under the circumstances, including the individual notice to all  
18 members of the Settlement Class who could be identified through reasonable effort,  
19 and fully satisfied the requirements of Federal Rule of Civil Procedure 23 and the  
20 requirements of due process. The Parties have complied fully with the notice  
21 provisions of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715.

22           8.       The Settlement was negotiated at arm's-length by experienced counsel  
23 who were fully informed of the facts and circumstances of the action and of the  
24 strengths and weaknesses of their respective positions, and with the assistance of  
25 United States Magistrate Judge David Duncan as a mediator.  
26

1           9.     The proposed Settlement warrants final approval because it is fair,  
2 adequate, and reasonable to the Parties, the 401(k) Plan, and the Settlement Class  
3 based upon: (1) the complexity, expense and likely duration of the litigation; (2) the  
4 reaction to the Settlement of the Settlement Class; (3) the stage of the proceedings and  
5 the amount of discovery completed; (4) the risks of establishing liability; (5) the risks  
6 of establishing damages; (6) the range of reasonableness of the Settlement Amount in  
7 light of the best possible recovery and the risk of no recovery; and (7) the range of  
8 reasonableness of the Settlement Amount to a possible recovery in light of all the  
9 attendant risks of litigation.

10           10.    The Court finds that the Settlement is fair, reasonable, and adequate as to  
11 each member of the Settlement Class, the Parties, the Plan, and in the public interest,  
12 and that the settlement is either: (a) not a prohibited transaction under ERISA; or (b) is  
13 exempt from ERISA's prohibited transaction provisions pursuant to applicable law or  
14 rules.

15           11.    The Final Approval Motion is GRANTED, and the Settlement is hereby  
16 APPROVED in all aspects. The Settling Parties are directed to implement the  
17 Settlement in accordance with the terms of the Settlement Agreement, including the  
18 Trustees and the Plan are directed to perform the Offsets of Coles' Account Balance  
19 pursuant to ERISA § 206(d)(4) as set forth in Section 7.4 of the Settlement Agreement,  
20 all subject to Section 9 of the Settlement Agreement.

21           12.    Within five (5) business days from the entry of this Order, the  
22 Westchester Insurance Company shall deposit the Settlement Cash Payment into the  
23 Settlement Fund.

24           13.    Class Counsel are hereby awarded attorneys' fees of \$750,000 and  
25 expenses of \$39,520.43. Such award shall be payable from the Settlement Fund in  
26 accordance with the terms of the Settlement Agreement.

1           14.    Named Plaintiff Robert Furst is hereby awarded a Case Contribution  
2 Award in the amount of \$1,000 and shall be paid pursuant to the Settlement  
3 Agreement.

4           15.    Without affecting the finality of this Judgment in any way, this Court  
5 retains jurisdiction over the Action, the Parties, the Plan and the Settlement Class for  
6 all matters relating to the implementation, interpretation, and enforcement of the  
7 Settlement Agreement, this Order and Final Judgment, and any application for fees  
8 and expenses incurred in connection with future actions necessary to fully  
9 consummate the Settlement and distribute the proceeds thereof.

10          16.    Without further order of the Court, the Parties may agree in writing to  
11 reasonable extensions of time to carry out any of the provisions of the Settlement  
12 Agreement.

13          17.    The Action and all claims contained therein, as well as all of the  
14 Released Claims, are dismissed with prejudice as to the Named Plaintiffs, the  
15 Settlement Class Members, and the Plans, and as against the Released Parties. The  
16 Parties are to bear their own costs, except as otherwise provided in the Settlement  
17 Agreement.

18          18.    The Settling Plaintiffs, on behalf of themselves, the Plan and the  
19 Settlement Class, are deemed to have, and by operation of this Order and Judgment  
20 shall have, absolutely and unconditionally released and forever discharged the  
21 Releasees from the Released Claims.

22          19.    All members of the Settlement Class are hereby forever barred and  
23 enjoined from prosecuting the Released Claims against Releasees, either derivatively  
24 or on behalf of themselves, or through any person purporting to act on their behalf or  
25 purporting to assert a Released Claim under or through them, in any forum, action or  
26 proceeding of any kind.

1           20.     The Court finds that the Settlement is fair, just, reasonable, and adequate  
2 as to each member of the Settlement Class, and that the Settlement Agreement, and the  
3 Settlement contained therein, is hereby finally approved in all respects, and the Parties  
4 are hereby directed to implement the Settlement in accordance with its terms and  
5 conditions.

6           21.     This Order and Judgment shall not be considered or used as an  
7 admission, concession, or declaration by or against Defendants of any fault,  
8 wrongdoing, breach or liability and this Court makes no such finding or determination.  
9 Neither the Settlement Agreement nor any of the proceedings in connection therewith  
10 shall be offered or received in evidence for any purpose, except that Defendants may  
11 submit this Final Order and Judgment to support a claim of *res judicata*, collateral  
12 estoppel, release or any theory of claim or issue preclusion, or they may submit this  
13 Final Order and Judgment in any action to enforce the injunctive provisions of  
14 Paragraph 10.

15           22.     In the event that the Settlement is terminated in accordance with the  
16 terms of the Settlement Agreement, then this Judgment shall be null and void to the  
17 extent provided and in accordance with the Settlement Agreement and shall be vacated  
18 *nunc pro tunc*, and in such event, all orders entered and releases delivered shall be  
19 void to the extent provided by and in accordance with the Settlement Agreement and  
20 Section 9 of the Settlement Agreement shall govern the rights of the Parties thereto.

21           23.     Final Judgment shall be entered herein.

22           DATED this 29<sup>th</sup> day of October 2012.

23  
24                               /s/ JOHN W. SEDWICK  
25                               UNITED STATES DISTRICT JUDGE  
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